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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL, *Appellants*

v.

RICHARD E. MOORE, ET AL, *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

BRIEF FOR APPELLEE GENE ZABOROSKI

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SUBJECT INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
QUESTIONS PRESENTED	4
STATEMENT	4
ARGUMENT:	
I. INTRODUCTION	7
II. REDISTRICTING IN MID-TERM NOT A NECESSITY	8
III. NO COMPELLING STATE INTEREST EXISTS TO JUSTIFY THE DENIAL OF CONSTITUTIONAL RIGHTS TO APPELLEES	13
IV. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY UNEQUAL PROTECTION BETWEEN MEMBERS OF THE SAME CLASS	16
V. THE QUESTION OF THE PRECINCT RESIDENCY OF JUSTICES OF THE PEACE AND CONSTABLES WOULD HAVE BEEN AVOIDED IF APPELLANTS HAD PRESERVED THE CONSTITUTIONAL RIGHTS OF APPELLEE	20
VI. THERE IS NO BASIS FOR APPLICATION OF ABSTENTION DOCTRINE	21
CONCLUSION	23
CERTIFICATE OF SERVICE	24
APPENDIX INDEX	25

LIST OF AUTHORITIES

CASES

	Page
Andersen v. Martin, 375 U.S. 399 (1964)	17
Arla Inc. v. Giarusso, No. 71-1364 (E.D. La. 1971)	22
Avery v. Midland County, Texas, 390 U.S. 474 (1968)	12, 13, 14, 15
Cooper v. Arron, 358 U.S. 1 (1958)	17
Dubois v. State of Louisiana, 339 F.Supp. 685 (E.D. La. 1972)	21
Doud v. Hodge, 350 U.S. 485 (1956)	22

CASES

	Page
Ellis v. Mayor of Baltimore, 234 F.Supp. 945 (D. Md. 1964) aff'd. and remanded 352 F.2d 123 (4th Cir., 1965)	14
Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972)	21
Gary v. Sanders, 372 U.S. 368 (1963)	13, 14
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	16, 17, 18
Hunter v. Erickson, 393 U.S. 385 (1969)	19
Hyden v. Baker, 286 F.Supp. 475 (M.D. Tenn. 1968)	14
Kaelin v. Borden, 344 F.Supp. 598 (E.D. Pa. 1971)	14
Louisiana v. United States, 380 U.S. 145 (1965)	17
Loving v. Virginia, 388 U.S. 1 (1967)	19
Martinoich v. Dean, 256 F.Supp. 612 (S.D. Miss. 1966)	14
Native American Church of Navajoland v. Arizona Corp. Commission, 329 F.Supp. 907 (D. Ariz. 1971) aff'd. 405 U.S. 901 (1972)	22
Reynolds v. Sims, 377 U.S. 533 (1964)	13, 14, 15, 17
Roman v. Sincock, 377 U.S. 695 (1964)	15
Sailors v. Ken Board of Education, 387 U.S. 105 (1967)	13, 16
Sims v. Baggett, 247 F.Supp. 96 (M.D. Ala. 1965)	17, 18
Standard Computing Scale Co. v. Farrell, 249 U.S. 571 (1919)	17
Strickland v. Burns, 256 F.Supp. 824 (M.D. Tenn. 1966)	14
United States v. Mississippi, 380 U.S. 128 (1965)	17
Whitcomb v. Chavis, 403 U.S. 124 (1971)	17, 18
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	22
Zwiekler v. Koota, 389 U.S. 241 (1969)	21

UNITED STATES CONSTITUTION

Fifth Amendment	5
Ninth Amendment	5
Fourteenth Amendment	5, 18, 19
Fifteenth Amendment	5, 17

UNITED STATES STATUTES

28 U.S.C.A. Sections 1343, 2201 and 2281	5
28 U.S.C.A. Section 2281	6
42 U.S.C.A. Sections 1983 and 1985(3)	5

TEXAS CONSTITUTION

Article V, Section 18	5, 16, 23

TEXAS CIVIL STATUTES

Article 2351½ Vernon's Annotated Texas Civil Statutes (Acts 1965, 59th Tex. Leg., p. 1523, ch. 664, Sec. 1 effected Aug. 10, 1965)	cited throughout brief

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BRIEF FOR APPELLEE GENE ZABOROSKI

Appellee Gene Zaboroski prays that the ruling of the United States District Court for the Southern District of Texas declaring Texas statute, Article 2351½ Vernon's Annotated Texas Civil Statute facially unconstitutional should in all things be affirmed.

OPINIONS BELOW

On January 30, 1974, the same day on which the Three-Judge United States District Court for the Southern District of Texas, Houston Division, heard oral argument, they issued the order appealed herein. A written opinion was filed by the three-judge District Court on February 8, 1974. Both the judgment order and opinion of the three-judge District Court are as yet unreported and a copy of the judgment order and of the opinion are appended hereto as Exhibits "A" and "B", respectively.

JURISDICTION

The judgment of the three-judge District Court was filed January 30, 1974. On February 4, 1974, Mr. Justice Powell stayed the execution and enforcement of the District Court judgment pending further order of the Supreme Court. On February 8, 1974, the three-judge District Court filed its written opinion. On February 19, 1974, the Supreme Court denied Appellee's Motion to vacate the Stay Order.

Appellants' jurisdictional statement was filed April 3, 1974 and thereafter on May 3, 1974, Appellee filed his Motion to Dismiss. Probable jurisdiction was noted by the Supreme Court on June 3, 1974.

This appeal is one from the judgment of a three-judge United States District Court for the Southern District of Texas, Houston Division, entering a declaratory judgment and granting a permanent injunction restraining the enforcement, operation and execution of a state statute.

STATUTE INVOLVED

Article 2351½, Vernon's Annotated Texas Civil Statutes (Acts 1965, 59th Tex. Leg., p. 1523, ch. 664, sec. 1, eff. August 30, 1965), provided as of the dates involved in this case, and presently so provides:

> "Art. 2351½. Change in boundaries of commissioners precincts and justice of the peace precincts
>
> (a) Whenever the Commissioners Court changes the boundaries of commissioners precincts or of justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective. If an election for any precinct office is held before the effective date of the order, the office shall be filled at the election by the voters of the precinct as it will exist on the effective date of the change in boundaries. A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precinct's not having been in existence for that length of time.
>
> (b) When boundaries of commissioners precincts are changed, the terms of office of the commissioner then in office shall not be affected by such change, and each commissioner shall be entitled to serve for the remainder of the term to which he was elected even though the change in boundaries may have placed his residence outside of the precinct for which he was elected.
>
> (c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable re-

sides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant."

Added by Acts 1965, 59th Leg., p. 1523, ch. 664, Sec. 1, eff. Aug. 30, 1965.

QUESTION PRESENTED

Whether Article 2351½ (c), Vernon's Annotated Texas Civil Statute, is facially unconstitutional?

STATEMENT

Appellee Gene Zaboroski, a white Republican candidate for the office of Justice of Peace of Precinct No. 6 of Harris County, Texas, was chosen by the voters of that precinct in the general elections of November, 1970. As provided for by statute, his term of office commenced on January 1, 1971 and his term of office was to expire at midnight on the 31st day of December, 1974.

However, on June 30, 1973, the Harris County Commissioners Court, a constitutionally created body responsible for, among other duties, the supervision, control and administration of certain voting laws enacted by the Texas Legislature, passed a redistricting order reconstituting certain Justices of the Peace and Constable Precincts, including Precinct No. 6. The redistricting order was ef-

fected through the power granted to the Commissioners Court pursuant to the mandates of Article 5, Section 18, Texas Constitution and Article 2351½, Texas Revised Civil Statutes Annotated (1971). As intended and effected, the ordered redistricting created new precincts primarily on the basis of racial, ethnic and political lines, without regard to the mandates of the one-man, one-vote rule. The publicly stated purposes for the redistricting of the Justice of the Peace and Constable precincts were to eliminate the gross population disparity existing in such precincts; to make the offices more convenient to all the people of the county; and to draw new precinct boundaries along ethnic or racial lines so as to assure the election of minorities to the offices of Justices of the Peace and Constables in the future. The main consideration, as contended by Appellants, for redistricting was that the gross population disparity of the various precincts created a compelling state interest to bring about redistricting of the said Justices of the Peace and Constable precincts.

As a direct result of the actions of Appellants, in passing a redistricting bill by a vote of 3 to 2, they effected the removal of Republican Appellee Zaboroski from his publicly elected office, Justice of the Peace of Precinct No. 6, Harris County, Texas.

This suit was brought by Appellee Gene Zaboroski, on his own behalf, and on behalf of all white voters in Harris County, Texas similarly situated, to vindicate the rights guaranteed to them by the United States Constitution, Amendments Five, Nine, Fourteen and Fifteen, and through certain Federal Civil Rights statutes, 42 U.S.C. Sections 1983 and 1985(3) and under 28 U.S.C. Sections 1343, 2201 and 2281.

All the parties to the cause of action filed agreed to stipulations of evidence concerning said suit and the matter was heard on oral arguments only by a three-judge District Court on January 30, 1974. On that date the Three-Judge District Court for the Southern District of Texas, Houston Division, issued its judgment order declaring as follows: (1) This Court has jurisdiction under Title 28, U.S.C.A., §2281. (2) The Texas statute Article 2351½, Vernon's Annotated Civil Statute is facially unconstitutional. (3) The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined. (See Exhibit A attached hereto.)

Approximately one month later on February 8, 1974, the District Court filed its written opinion stating:

> "Insofar as Article 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so effected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination. Certainly it was not necessary to effect redistricting in midterm or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analagous section pertaining to county commissioners, Article 2352½(c), expressly provides that the term of office of a county commissioner is not to be effected by redistricting, even though its effect may be to place his residence outside the precinct to which he was elected."
>
> "The duly elected justice of the peace and constables, Plaintiffs herein, are entitled to serve the terms to which they were elected." (See Exhibit B.)

Additionally, the Court after hearing all of the evidence, stipulations and arguments of counsel, found that no compelling state interest is served to justify such effects of the statute.

ARGUMENT

I. INTRODUCTION.

The question raised by the findings and order of the three-judge District Court is a relatively simple one and is confined to the single question, "Is Article 2351½(c) facially unconstitutional?"

The opinion of the three-judge District Court held that there was no compelling state interest served by the acts of the County Commissioners which "operates to truncate the term of a duly elected official upon the circumstances that mere convenience redistricting places him in a district with others," and that "it invidiously and irrationally discriminates between him [Justice of the Peace] and others not so affected and between the effect of the votes of those who voted or those who were entitled to vote in this election and voters whose franchise were not so bobbed". (Exhibit B at 34). Appellants in their brief cite several state interests which allegedly were served by the redistricting of the Justice of the Peace and Constible precincts and attempt to argue that such interests were compelling state interests and thereby legitimize Appellants' actions if Appellee or the Court cannot show an element of intentional or purposeful discrimination against those Justices of the Peace and Constables removed from office.

II. REDISTRICTING IN MID-TERM WAS NOT A NECESSITY.

Before Appellee would show this Honorable Court how shallow and meaningless are the compelling state interests offered by Appellants as justification for their unconstitutional acts, Appellee would like to put to rest, once and for all, Appellants' claim that, "no redistricting could ever be effected which would not cut short the term of office of at least some of the offices in question." (App. Brief at 27).[1]

Obviously this statement is not true. The fact is that there are several ways in which the redistricting complained of herein could have been accomplished without offending the constitutional rights of any of the Appellees. However, in light of their actions, it is not surprising that Appellants argue the necessity of effecting redistricting in mid-term,[2] because they never made a good-faith effort to protect the constitutional rights of those office holders and voters who were disenfranchised by this redistricting. This lack of good-faith on behalf of the Harris County Commissioners Court evidenced by not effecting a redistricting plan for Justices of the Peace and Constables which would not have bobbed the rights of office holders or voters was so glaring that it prompted the Honorable Judge John V. Singleton[3] to question Appellants' motives in ordering the redistricting:

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1. App. Brief references are to Appellants' Brief on the Merits filed July 18, 1974.

2. App. Brief at 19.

3. The three-judge District Court was composed of the Honorable Thomas Gibbs Gee, Fifth Circuit Judge, the Honorable John V. Singleton, Jr. and the Honorable Carl O. Bue, District Judges from the Southern District of Texas.

> "Can you think of any other incident in the entire spectrum of our government where any elected post is given that type of unlimited discretion over another elected official?"
>
> "Can you think of any area in our entire system of government where one body is given the unlimited discretionary power to remove from office another elected official?"[4]

This lack of good-faith and insensitiveness to the needs of the voters of Harris County was displayed by the clandestine method in which the redistricting plan was presented to the Commissioners Court for approval. Commissioner Robert Y. Eckels testified that he was not aware of the "Bass plan" until the morning it was presented for a vote. (Deposition of Robert Y. Eckels at 30, 31). When questioned as to the reason behind an immediate implementation of the redistricting plan, the only justification was, "that it needed to be done now, as far away from the county elections as possible, so the dust could settle and not have controversy. . . ." (Deposition of Robert Y. Eckels at 18). The reason Appellants wanted the "dust to settle" and implemented the redistricting in mid-term was to gain the opportunity to fill those vacancies created by the redistricting with political favorites. Albeit those appointees were to include several members of minorities whose participation in County government was desperately wanting, it is the manner and method in which these admirable goals were thrust upon the unsuspecting elected office holders and their constituents that offends Appellees' constitutional rights.

Nevertheless, assume arguendo that there were no "bad motives" on behalf of the Harris County Commissioners

4. Transcript of proceedings January 30, 1974 at 71-72; see also, comments of the Honorable Judge Thomas Gibbs Gee at 60.

Court in ordering the redistricting to be effective in mid-term, there still was a deprivation of Appellee's constitutional rights. First of all, if the Justices of the Peace and Constable precincts had existed as they were for over 100 years, a few more months would not have caused any irreparable harm to the residents of Harris County. With this in mind, Appellants could have made the redistricting effective at the end of the term of the present encumbants. In this manner the elected Justices of the Peace and Constables would have remained in their elected offices until their respective constitutionally created terms had expired. Then when the new Justices of the Peace and Constables were elected they would have been elected by the voters of the new Justices of the Peace and Constable precincts.

There is really nothing novel about this idea in that it was immediately brought to the attention of Appellants during oral argument before the three-judge District Court by the Honorable Judge Thomas Gibbs Gee.

> "Counsel, you are not seriously arguing that this had to be done, that the post had to be eliminated in order to get more equal precincts, are you, because that could have been avoided in many ways."
>
> "In the first place, the order might have been made effective only at the end of the term of the then present encumbant. . . ."[5]

And when one examines Sections (a) and (b) of Article 2351½ it is apparent that this course of action was actually what the legislature intended when they adopted language reading:

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5. Transcript of proceedings January 30, 1974 at 54, 62.

> "Whenever the Commissioners Court changes the boundaries of commissioners precincts *or of Justice precincts, it may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective.*"
>
> . . . . A person who has resided within the territory embraced in the new boundaries for the length of time required to be eligible to hold the office shall not be rendered ineligible by virtue of the precincts not having been in existence for that length of time."[6]

In fact, it is hard to imagine for what other purpose this language could have been intended, especially when viewed in light of the particular mention paid to County Commissioners remaining in office for the remainder of their term even though the change in boundaries may have placed their residence outside the precinct for which they were elected.[7]

A second procedure for redistricting by which Appellants could have preserved and protected the constitutional rights of all Appellees, would have been for the Harris County Commissioners Court to have drawn the new Justice of the Peace and Constable precinct boundary lines in such a manner that all of the Justices of the Peace and Constables in office at the time of the redistricting would have remained in office after the redistricting; *i.e.*, insure that not more than one Justice of the Peace or Constable resides within a precinct so changed.

This solution was also offered by Honorable Judge Thomas Gibbs Gee during oral argument before the three-judge District Court as an alternative to the plan

6. Article 2351½(a).

7. Article 2351½(b).

adopted by the Harris County Commissioners Court and now under scrutiny and Appellants evidently from the tone of their brief[8] agree, at least in principle, that this solution was theoretically possible. It does not seem that it would have been unreasonable or even a difficult task for Appellants to have added to their alleged states purposes the additional requirement that no duly elected official was to be removed from his office by the redistricting. It is also striking that the only Republican Justice of the Peace was arbitrarily removed and a Democrat crony of the three-man majority of the Commissioners Court appointed in his place; couple this with the careful carving of Appellee Zaboroski's voting precinct which assures election of future Democratic candidates to the new voting precinct, and the political motives become blatantly apparent. It would also seem that any committee with as diversed interest as the nine persons appointed to formulate an acceptable redistricting plan would not have been hampered in the slightest by such an additional burden as protecting the constitutional rights of the voters and elected officials. In this regard, it should be noted that when this same committee was faced with the strict requirements of the one-man, one-vote rule of *Avery v. Midland County, Texas,* 390 U.S. 474, in redistricting the four precincts of the County Commissioners, they did so within the constitutional limitations required by this Court. However, when operating without constitutional guidelines and only in response to political patronage and special interest groups to insure "minority participation" this committee, dominated by County Commissioner Tom Bass, designed and promoted a redistricting plan lacking in equal protection, devoid of due process and reaking of political opprobium.

8. App. Brief at 19.

Without belaboring the point, it would appear that the contention of Appellant that "no redistricting could ever be effected which would not cut short the term of office of at least some of the offices in question" is totally without merit, and therefore cannot justify or even support a good-faith reliance upon effecting redistricting in mid-term.

III. NO COMPELLING STATE INTEREST EXISTS TO JUSTIFY THE DENIAL OF CONSTITUTIONAL RIGHTS TO APPELLEES.

In *Reynolds v. Sims,* 377 U.S. 533 (1964), the equal protection clause was applied to the apportionment of state legislatures. The Supreme Court held that every qualified resident had the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that such right was infringed when legislators were elected from districts of substantially unequal population.

The Supreme Court sought to clarify *Reynolds,* supra. in *Sailors v. Kent Board of Education,* 387 U.S. 105 (1967) and to identify the circumstances in which application of the one-man one-vote rule was required. This Court noted that there was no constitutional requirement that state and local officers of non-legislative character be chosen by election rather than appointment. However, the question of the applicability of the rule where elections was required was left open and the Court held, assuming arguendo "where a state provides for an election of a local officer or agency—whether administrative, legislative or judicial—the requirements of *Gray v. Sanders* and *Reynolds v. Sims* must be met," 387 U.S. at 111.

This open question was substantially resolved by *Avery v. Midland County*, supra, decided shortly thereafter:

> "The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparat population. As also every court which addressed itself to this question, we hold it does."[9]

The one-man one-vote rule has been applied with great breadth: It has been held to govern the election of County Commissioners, *Avery v. Midland County*, supra; *Kaelin v. Borden*, 344 F.Supp. 598 (E.D. Pa. 1971); and Justices of the State Supreme Court and Courts of Appeal, *Gray v. Sanders*, supra.

In *Gray* the Court held that the rule must be applied to elected state executive and judicial officers as well as to their legislative breathern.

> "[O]nce the class of voters is chosen and their qualifications specified we see no constitutional way by which equality of voting power may be abated."

372 U.S. 381. *Accord, Ellis v. Mayor of Baltimore*, 234 F.Supp. 945 (D. Md. 1964), aff'd. and remanded, 352 F.2d 123 (4th Cir. 1965); *Hyden v. Baker*, 286 F.Supp. 475 (M.D. Tenn. 1968); *Martinoich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966); *Strickland v. Burns*, 256 F.Supp. 824 (M.D. Tenn. 1966); all cases applying *Reynolds* to local government.

While population is the starting point and the con-

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9. *Id.* at 478-479; see also the cases in which the highest State Court applied the principles of *Reynolds* to units of local government collected at 390 U.S. 479 n. 3.

trolling criteria for decision in apportionment controversies, *Reynolds,* supra, mathematical exactness in districting is neither possible nor required. For instance, in *Roman v. Sincock,* 377 U.S. 695 (1964) the Supreme Court stated that the proper judicial approach in apportionment cases was to determine whether under the particular circumstances existing, there had been faithful adherence to a plan of population-based representation, with only such minor deviations as might occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

What must be pointed out at this time is the fact that the redistricting of June 28, 1973 was a voluntary, rather than mandatory, court ordered plan. With one hand the Harris County Commissioners Court voluntarily undertook to redistrict Justice of the Peace and Constable precincts, "for the convenience of the people," with the stated purpose of conforming to the one-man one-vote rule. And then with the other hand, Appellants proceeded to adopt a plan not even remotely approaching *Avery* requirements.

Even a cursory view of Exhibit C reveals that the requirements of *Avery* have been completely ignored. The redistricting order of June 28, 1973 established new precincts having substantial and significant population variances, with one precinct having as much as 2½ times the population of another. A population percentage of over 135%. See Exhibit C. Such a scheme is patently invalid, and cannot be presumed even to be a good-faith attempt to follow the mandate of *Reynolds.* How then, can Appellants claim as a compelling state interest their intention to redistrict to effect the one-man one-vote rule?

IV. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY UNEQUAL PROTECTION BETWEEN MEMBERS OF THE SAME CLASS.

The United States Supreme Court has repeatedly held that a state cannot manipulate its political subdivisions so as to defeat a federally protected right as for example, by realigning political subdivisions so as to deny a person his vote because of race, *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Sailors v. Kent Board of Education,* supra.

The Texas Constitution, Article V, Section 18, and Article V, Section 24, establishes County Commissioners, Justices of the Peace and Constables as county officers. As county officers, they are members of the same class and Article 2351½ is facially unconstitutional in that it discriminates against members of the same class by treating them differently with no compelling reason or justification.

Paragraph (a) of Article 2351½ involves Commissioners Court changing a Commissioners' precinct boundaries during the term of their office and provides the following:

> "It may specify in its order a future date, not later than the first day of January following the next general election, on which the changes shall become effective."

However, Paragraph (c) of Article 2351½ does not require the Commissioners Court to delay the effective date of a change in precinct boundaries or redistricting of a Justice of the Peace or Constable precinct until, "the first day of January following the next general

election." This obvious legislative negative delegation of different standards or treatment between commissioners of a Commissioners Court in Paragraph (a), and of Justices of the Peace and Constables in Paragraph (c) of Article 2351½ is an uncontrovertable example of "unequal treatment of persons within the same class."

Local bodies to whom the state delegates authority cannot circumvent this restraint imposed by the Constitution. *Standard Computing Scale Co. v. Farrell,* 249 U.S. 571, 577 (1919); *Cooper v. Arron,* 358 U.S. 1, 17 (1958).

In *Gomillion* this Court held that a statute passed by the Alabama legislature gerrymandering the boundaries of the City of Tuskegee "from a square to an uncouth 28 sided figure" in order to disenfranchise a majority of negro voters was unconstitutional as violative of the Fifteenth Amendment.

Denial or delution of the right to vote on the basis of race has been struck down consistently by the Courts, irrespective of the method utilized to bring about such denial of the franchise. See *e.g., United States v. Mississippi,* 380 U.S. 128 (1965); *Louisiana v. United States,* 380 U.S. 145 (1965) (voter interpretation test invalid); *Andersen v. Martin,* 375 U.S. 399 (1964) (printing of candidates race on the ballot held invalid).

Gerrymandering on the basis of race is by itself a violation of the Fourteenth and Fifteenth Amendments to the Constitution, *Sims v. Baggett,* 247 F. Supp. 96, 104 (M.D. Ala. 1965), aff'd. sub. nom.; *Reynolds v. Sims,* supra. There has been and should be no hesitation in striking down such contrivances when they infringe on protective rights, *Whitcomb v. Chavis,* 403 U.S. 124, 149 (1971).

In *Whitcomb* a challenge was made to state statutes establishing Marion County, Indiana, as a multi-member district for the election of state representatives on the basis that the law diluted the votes of negroes and poor persons living in the ghetto area of Marion County. This Court distinguished cases such as *Sims* and *Gomillion* and reversed the three-judge District Court finding that the statutes were unconstitutional only because:

> "[T]here is no suggestion here that Marion County's multi-member district or similar districts throughout the state were conceived or operated as purposeful devices to further racial or economic discrimination."

However, at bar, Appellants have never challenged the allegation that one of the primary purposes of redistricting was to draw the Justice of the Peace and Constable precinct lines in such a manner that minority enclaves were created within the county.[10] Appellant compounds this illconceived derogation of their fiduciary duty to the residents of Harris County by appointing political favorites to fill the vacancies created by the redistricting with their eyes not on "the convenience of the people" but rather to broadening their own political power base and insuring their continued existence and election to office. If one accepts this as the true reason for redistricting, the real motive behind the necessity of a mid-term implementation of the redistricting surfaces in the form of time to allow their appointees an opportunity to ingratiate themselves in office and help insure their own re-election.

The clear and essential purpose of the Fourteenth Amendment was to eliminate all official state sources

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10. App. Brief at 5.

of invidious racial discrimination, *Loving v. Virginia,* 388 U.S. 1 (1967), and for that reason racial classifications are always constitutionally suspect, subject to the most rigid scrutiny, and bear a far heavier burden of justification than other classifications. *Hunter v. Erickson,* 393 U.S. 385 (1969).

Similarly, gerrymandering and other schemes when effected for the purpose of discrimination on the basis of ethnic origin, religion, wealth, or political affiliation must be held to violate the equal protection clause of the Fourteenth Amendment.

The sworn testimony presented by depositions to this Court clearly reflects that a primary and avowed purpose of the Commissioners Court in redistricting was to realign voting districts on the basis of race, ethnic origin and political affiliation and that said redistricting was enacted for the additional purpose of creating "safe" Democratic districts composed of minorities and for the purpose of removing from office the sole elected Republican Justice of the Peace, Appellee Gene Zaboroski.

It is quite obvious that the equal protection clause, which prohibits arbitrary and invidious discrimination between citizens of the same class has been contravened by the legislative attempt to circumvent both the express mandate of ArticleV, Section 18 and Section 24 and the prohibitions embodied in the equal protection clause itself by the arbitrary treatment of Justices of the Peace and Constables and County Commissioners within their same county.

V. THE QUESTION OF THE PRECINCT RESIDENCY OF JUSTICES OF THE PEACE AND CONSTABLES WOULD HAVE BEEN AVOIDED IF APPELLANTS HAD PRESERVED THE CONSTITUTIONAL RIGHTS OF APPELLEE.

Appellants argue at some length in points B(a) and (4) of their brief that the Texas residence requirement that Justices of the Peace and Constables must reside in precincts which they serve, is a compelling state interest justifying the removal of such non-resident Justices of the Peace and Constables from office after a mid-term redistricting. This is, of course, the ultimate case of the tail wagging the dog. Note how quickly these two "compelling state interests" would be rendered moot if Appellants had simply seen fit to use either of the two plans for implementing redistricting set out by Appellee, supra.

If Appellant, had either implemented the redistricting at the end of the elected term of each respective Justice of the Peace or Constable or had altered the precinct lines of the Justice of the Peace or Constable precincts so as to include only one Justice of the Peace and Constable in each precinct, they would have avoided the fiction of having to create a compelling state interest to justify the removal from office of those Justices of the Peace and Constables who did not comply with their intended results.

Hindsight reveals that it was not until some time after the Justice of the Peace and Constable precincts had been redistricted and a lawsuit filed in the Federal Court on behalf of the ousted Justices of the Peace and Constables that Appellants began to concern themselves with "compelling state interests." Appellees now find themselves in the

ludicrous position of giving credence to Appellants' dog wagging position when the entire incident was caused by Appellants' lawless acts and could have been avoided with no harm to either side.

VI. THERE IS NO BASIS FOR APPLICATION OF THE ABSTENTION DOCTRINE.

The Federal Courts have repeatedly emphasized that abstention is appropriate only in narrowly limited special circumstances, *Zwickler v. Koota,* 389 U.S. 241, 248 (1967). The governing rule was succinctly stated in *Garvin v. Rosenau,* 455 F.2d 233 (6th Cir. 1972):

> "The mere fact that a constitutional decision conceivably could be avoided or that federal-state friction might arise does not automatically justify resort to the doctrine. The facts and circumstances of each case must be carefully examined in order to evaluate the policies to be served by abstention. *Thus, resort to abstention is appropriate only if the narrowly limited countervailing interests are, on balance, more important to the federal constitutional system than a litigants right to a federal forum.*" (Emphasis added).

Id. at 238. Judge Wisdom, specially conferring in *Dubois v. State of Louisiana,* 339 F. Supp. 685, 690-61 (E.D. La. 1972, noted the extremely limited scope permissible in applying the abstention doctrine, and cautioned against reading the Court's decision of that day as adding breadth to the doctrine. Judge Wisdom stated that, where a state statute had been recently amended and there had been no opportunity for authoritative state court interpretation of the new provisions, and where a state civil action involving identical questions was pending, the

pending lawsuit provided "a reasonable hope of a prompt state court construction question," thereby making application of the abstention doctrine appropriate. *Id* at 690; *Arla Inc. v. Giarusso,* No. 71-1364 (E.D. La., Nov. 1971). He went on to caution that:

> "[O]ur decision [in *Dubois*] should not be read to require or even authorize the postponement of federal jurisdiction in constitution litigation when no state court construction of the state law under attack is clearly shown to be forthcoming."

Id. accord, *Wisconsin v. Constantineau,* 400 U.S. 433, 438, 438-39 (1971) (abstention proper only where there are presented "unresolved questions of state law which only a state tribunal could authoritatively construe," which are dispositive of the constitional question).

In *Constantineau,* the Supreme Court affirmed the taking of jurisdiction by a three-judge federal court even though the statute which had been struck down had never been challenged or tested in the Wisconsin state courts.

Thus, even where state courts have not yet rendered a clear or definite decision as to the applicability or constitutionality of the statutes in question, the federal courts are not deprived of jurisdiction to consider claimed relief under Section 1983, *Doud v. Hodge,* 350 U.S. 485 (1956); *Native American Church of Navajoland v. Arizona Corp. Commission,* 329 F. Supp. 907, 909 (D. Ariz. 1971), aff'd 405 U.S. 901 (1972).

In the instant case there is neither a civil nor a criminal action pending in the state courts wherein the significant constitutional questions here raised could be decided. The provisions under attack are not newly enacted or amended;

in fact, Article V, Section 18 of the Texas Constitution has remained substantially in its present form since 1875, with slight amendment in 1954. Similarly, Article 2351½ was enacted in 1965.

There is no basis for abstention on questions of such import and weight as are here presented, particularly the issue as to denial of equal protection on the basis of race—a guarantee which has been jealously guarded in federal courts since the enactment of the Civil War amendments.

CONCLUSION

Based upon the ruling and opinion of the Three-Judge United States District Court for the Southern District of Texas holding that there was no compelling state interest to justify the actions of the Commissioners Court and the feeble compelling state interests set out in Appellants' brief, Appellee respectfully submits this Honorable Court should in all things affirm the judgment of the United States District Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for the Appellee Gene Zaboroski do hereby certify that on this _____ day of August, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following Appellants' Attorneys and other Appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Brief of Appellee Gene Zaboroski":

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By_____
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By_____
GERALD A. WOOLF

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A—Judgment Order of the District Court

Exhibit B—Opinion of the District Court

Exhibit C—Population Exhibit of Precinct

EXHIBIT A

FOR THE SOUTHERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRICT COURT

Houston Division

CIVIL ACTION NO. 73-H-993

RICHARD E. MOORE, J. C. BOLTON, VERNON G. DOERING, J. W. MAHAN, GENE ZABOROSKI, and JOHN HOWE BOYNTON, on His Own Behalf and on Behalf of Every Resident Citizen of the Former Justice of the Peace Precincts Nos. 5, 6, and 7 of Harris County, Texas

v.

HARRIS COUNTY COMMISSIONERS COURT, WILLIAM ELLIOT, Individually and as County Judge of Harris County, E. A. LYONS, Individually and as a Member of the Harris County Commissioners Court, ROBERT ECKELS, Individually and as a Member of the Harris County Commissioners Court, JAMIE BRAY, Individually and as a Member of the Harris County Commissioners Court, and TOM BASS, Individually and as a Member of the Harris County Commissioners Court

ORDER

This action came on for hearing before a three-judge district court composed of the Honorable Thomas G. Gee, Circuit Judge, the Honorable John V. Singleton, Jr., District Judge, and the Honorable Carl O. Bue, Jr., District Judge, and the issues having been duly heard and decision having been duly rendered

It is ORDERED and ADJUDGED that

I. This court has jurisdiction under Title 28, U.S.C.A. § 2281.

II. The Texas statute Article 2351½, Vernon's Ann. Civ. St., is facially unconstitutional.

III. The order of the Commissioners Court of Harris County, Texas, of June 28, 1973, complained of herein issued pursuant thereto is therefore permanently enjoined.

An opinion of this court will follow.

DONE at Houston, Texas, on this the 30th day of January, 1974.

/s/ _____
Thomas Gibbs Gee
Circuit Judge

/s/ _____
John V. Singleton, Jr.
District Judge

/s/ _____
Carl O. Bue, Jr.
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

NO. 73-H-993

RICHARD E. MOORE, ET AL

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

NO. 73-H-1033

BLACKIE NEELEY

v.

HARRIS COUNTY COMMISSIONERS COURT, ET AL

Before GEE, Circuit Judge, SINGLETON and BUE, District Judges. GEE, Circuit Judge:

Plaintiffs are duly elected Justices of the Peace, Constables and voters of three former Harris County precincts which have been abolished by order of defendants, the County Judge and Commissioners of Harris County, Texas. At the time of the order, and today, the terms to which the plaintiff office-holders were elected had not expired. The Commissioners acted under authority of a Texas Constitutional provision[1] permitting revision of precincts from time to time "for the convenience of the people" and Article 2351½, Texas Revised Civil Statutes. This article provides, in pertinent part, as follows:

1. Tex. Const. Art. 5, §18.

(c) When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant.

The manner in which defendants' order redrew the Harris County precinct lines resulted in the vacating of Plaintiffs' offices by force of the quoted portion of the statute.

The statute is attacked on numerous grounds, most of which we need not discuss, since we conclude that its effect to end the term of some of the duly elected justices of the peace and constables of Harris County constitutes an impermissible abridgement of the franchise of those entitled to vote for them and a violation of the equal protection clause, both without the showing of any compelling state interest to be served thereby.

Defendants are local officers, functioning pursuant to statewide policies embodied in the constitutional and statutory provisions cited. An injunction is sought on constitutional grounds against the effect of Article 2351½ to truncate the term of some of the plaintiffs and set at nought the vote of those who elected them to these offices.

These offices are the creation of state law; the jurisdiction of the offices in question is statewide,[2] and the statute attacked is of statewide effect, and impact. The constitutional issues raised are not facially insubstantial, and the complaints clearly called for the convening of a three-judge court.

We are not unmindful of the decision in *Snowden v. Hughes*, 321 U.S. 1 (1944), in which the right of a citizen to be a candidate for state office was held to be unprotected by the privileges and immunities clause of the Fourteenth Amendment, or that in dicta the court extended its holding to the right to vote and hold such office. But we are persuaded that this case is not controlled by *Snowden*.

In the first place, on its facts *Snowden* involved a candidacy only. We treat here of a Texas state office, which has been repeatedly held by the courts of Texas to be a species of property, *e.g.*, *State ex rel Jennett v. Owens*, 63 Tex. 261 (1885). The Fourteenth Amendment might well be seen as extending protection to an elected and qualified office-holder, but not to a mere aspirant as in *Snowden*.

In the second place, it appears that events have marched by the view taken in *Snowden* of the division of state and federal responsibilities.[3] More recent Supreme Court decisions have sapped the force of *Snowden's* vision of the federal structure. The "privileges and immunities" clause of the Fourteenth Amendment has become irrele-

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2. E.g. Arts. 2385, 6885, Tex. Rev. Civ. Stat. The jurisdiction of a justice of the peace is to be distinguished from the venue limitations of Art. 2390, R.C.S.

3. See Mancuso v. Taft, 476 F.2d 187, 196-97 n. 14 (1st Cir. 1973).

vant in considering protection of the right to run and vote for state office. Modern concepts of equal protection have assumed that burden. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92 (1972); *White v. Regester,* ____ U.S.____, 37 L.Ed.2d 314 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L.Ed.2d 169 (1966); cf. *Oregon v. Mitchell,* 400 U.S. 112, 27 L.Ed.2d 272 (1970).

Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination.[4] Certainly it was not necessary to effect redistricting in mid-term or, if that were thought pressing, it was not compelling that the office be declared vacant as a result. Indeed, the analogous section pertaining to county commissioners, Art. 2351½ (b), expressly provides that the term of office of a county commissioner is not to be affected by redistricting, even though its effect may be to place his residence outside the precinct for which he was elected.

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4. Defendants' only contention which approaches advancing such an interest for *redistricting* is that the old precincts were egregiously disproportionate in population. This is true, but the new districts were clearly not drawn with any ideal of population equality foremost in mind; the order establishing them itself recites that one contains almost two and one-half times as many people as another. Nor would population equalization, if seen as a compelling reason for redistricting and faithfully served in drawing the new precincts, bear any necessary relation to vacating these offices, a different consideration entirely.

The duly elected justices of the peace and constables, plaintiffs here, are entitled to serve the terms to which they were elected. Insofar only as Article 2351½, Texas Revised Civil Statutes mandates otherwise, it is unconstitutional. Insofar only as defendants' order of January 30, 1973, undertakes to appoint other persons to plaintiffs' offices, and to prevent plaintiffs from carrying out the duties and receiving the emoluments of their offices during the term to which they were elected, it is likewise invalid.

/s/ _____
Thomas Gibbs Gee
United States Circuit Judge

/s/ _____
John V. Singleton, Jr.
United States District Judge

/s/ _____
Carl O. Bue, Jr.
United States District Judge

EXHIBIT C

The population count of the eight justice precincts, before and after the redistricting of June 28, 1973; the population difference between the smallest precinct and the remainder of the precincts after redistricting; a percentage comparison between the smallest precinct in population and the remainder of the precincts in population after redistricting; the area of each precinct in square miles after redistricting; and a percentage comparison between the smallest precinct in square miles and the remainder of the precincts after redistricting, as as follows:

Pct. No.	Percentage Before	Population After	Population Difference After	Population Percentage Comparison After	Area In Square Miles After	Area Percentage Comparison After
1.	999,424	343,765	197,865	135.5%	66.0	3.8%
2.	436,974	145,960	Base Number	Base Number	88.0	5.0%
3.	111,105	169,959	23,999	16.0%	338.0	19.4%
4.	81,879	175,769	29,809	20.4%	593.0	33.9%
5.	6,966	337,844	191,884	131.4%	399.0	22.8%
6.	8,848	179,971	34,011	23.3%	32.0	1.8%
7.	11,976	238,401	92,411	63.3%	83.0	4.7%
8.	84,739	149,863	3,903	2.6%	150.0	8.6%

* The total population of Harris County, Texas per the 1970 Bureau of the Census Report is 1,741,912 persons.

* The total number of square miles in Harris County, Texas is 1750.